

ON THE HORIZON

LORD JOWITT AND THE CASE OF ALGER HISS

A Lawyer Examines the British Jurist's Logic

JAMES GROSSMAN

WHEN Lord Jowitt's book, *The Strange Case of Alger Hiss*, was about to appear in America, the copies that had already been distributed were withdrawn and it was announced that the publication was being delayed. The delay had something of that hint of the sinister that has hung over the Hiss case from the beginning. Just as one had constantly heard that there was an ugly truth at the bottom of the case that was being suppressed, now one heard that Lord Jowitt's book was to be suppressed in America. This was easy to believe, for we live, it has been very justly said, not under a reign of terror but under a reign of the terrified; we expect the worst and are almost disappointed when it does not come.

Hiss and Chambers, the Rosenbergs, perhaps now Harry Dexter White—current history, it seems, revolves around investigations, grand jury proceedings, Congressional hearings, and trials, and we will have to become somewhat expert in legal matters if we are to judge intelligently some of the most important issues of our times. Lord Jowitt, formerly Lord Chancellor in the British Labor government, has written a book (*The Strange Case of Alger Hiss*; British edition, Hodder and Stoughton 20/; American edition, Doubleday, \$3.95) analyzing the record of the Hiss trial, and questioning the verdict arrived at. Here JAMES GROSSMAN, a New York lawyer and writer, examines Lord Jowitt's analysis, which has created some stir on both sides of the water. Mr. Grossman is the author of *James Fenimore Cooper*, in the American Men of Letters Series. He was born in New York City and holds degrees from both the College and the Law School of Columbia University.

Now that the American edition is out one can see that the reason officially given for the delay was the true one; a great many changes have been made in the text. It must surely be unusual that a book on a legal subject by a distinguished lawyer is revised to meet criticism by laymen. Yet this seems to be what has happened in the case of Lord Jowitt's book. The changes that have been made in the American edition are apparently intended to correct errors of fact and faults in reasoning pointed out by reviewers of the British edition.

The curious thing about Lord Jowitt's errors is that, substantial as they are, their elimination has in no way affected the general tenor of his argument. On occasion, because of changes he has made, his premises will disappear entirely, but his conclusions remain undisturbed. This result is the logical consequence of the book's general approach to its subject. This approach is a devastating, thoroughgoing skepticism, applied however only to a strictly limited field of observation: the words and conduct of Whittaker Chambers.

RUNNING through Lord Jowitt's book is an unexpressed syllogism that is something like this: if Chambers made a mistake in anything he has said, or even if he has said anything that cannot be corroborated, his statement must be treated as being deliberately false; since he has thus been proved to be deliberately false in matters that cannot be corroborated, we should doubt his testimony even in matters that seem fully corroborated.

This one-sided application of doubt not only creates different standards for judging

Chambers and Hiss but also creates different standards for judging Chambers himself at different times. He is sometimes considered as having been what he says he was—a treacherous, deceitful Communist; and it is suggested that this makes him untrustworthy now. At other times Lord Jowitt writes as if Chambers admits that he held in the past the reactionary political views he now holds; hence Chambers' charge that Hiss is a Communist is untrustworthy. ("To a man like Chambers, who admits he saw no difference between Liberals, Socialists, and New Dealers on the one hand and Communists on the other, this [sympathy with the Socialist party, which Lord Jowitt attributes to the Hisses] may have been proof 'as strong as Holy Writ' that Hiss was a Communist.")

The greatest triumph of skepticism is in the solution of the question of Chambers' motive for lying about Alger Hiss. Lord Jowitt doubts the value of the psychiatrists' testimony on Chambers' "psychopathic personality"; doctors, he says, draw too generous conclusions from too slender means. Yet it is precisely from the slenderest of means—the psychiatrists' analysis of Chambers' "books and poems" (his books were all translations and his poems a mere handful)—that Lord Jowitt has come to the conclusion, or suggests that his reader come to the conclusion, that "the absence of motive is explained." The explanation is never stated explicitly, and I am not sure that it amounts to more than that Chambers may have lied without motive.

Lord Jowitt, on the basis of his own reading of Chambers' testimony and of Chambers' autobiography, *Witness*, has decided that "with Chambers the desire to embroider and embellish is so transcendent that I do not believe he knows when he is leaving the straight and narrow path of truth." If Lord Jowitt is right, one would expect to find progressive distortions of the truth by Chambers reaching a climax in *Witness*. There is no such progression. *Witness* brings the Hiss case to a climax only aesthetically—it is one of the great books of our time, and one would think that it is proof of an ordered and not of a disordered mind. Perhaps no autobiographer has ever had Chambers' peculiar problem, in that practically his whole life had already, before he sat down to write it, been told and retold in great detail and ex-

amined and cross-examined at lengthy hearings and trials. Despite this, Chambers in his autobiography retells his story with freshness and makes it an exciting narrative. But more important for our purpose, *Witness* is remarkable for its faithfulness to the record that had already been set down. Had it varied, undoubtedly a motion for a new trial would have been made in the Hiss case on the very ground of that variance.

How difficult it can be not to depart from the record, Lord Jowitt's book itself illustrates. In the British edition he wrote that when Chambers appeared before the House Committee on Un-American Activities in August 1948 and charged that Alger Hiss and others who had been in the government service had been Communists, Chambers was asked if he had documents to prove this, to which he replied that he had no evidence of any documents having been "turned over," and "was at pains to deny that the group was in any way concerned with espionage." In the American edition Lord Jowitt has changed every one of these statements, because they are all incorrect. Where he had written that Chambers was inevitably asked about documentary proof, he has now written instead, "Curiously enough, no such question was asked. . . ." Since Chambers had not been asked about espionage and certainly had not been at pains to deny it, Lord Jowitt has now written instead that Chambers "clearly implied that the group was not concerned with espionage."

Actually, Chambers in his House Committee testimony was unclear on whether the Ware Communist group in Washington was at all concerned with espionage. Espionage as a secondary activity seems to be implied in Chambers' statement that "The purpose of this group at that time was not primarily espionage." And when Lord Jowitt writes that it is admitted that Chambers never revealed either to Adolph Berle (in 1939) or to Ray Murphy of the State Department (to whom he spoke in 1945 and 1946 about Communism) anything suggesting espionage, he adds yet further errors in his reading of the record. In speaking to Berle, Chambers must have made some connection between Communism and espionage, for the very first words in Berle's contemporaneous notes are "Underground Espionage

Agent." And there is an unclear statement in Ray Murphy's notes ("The persons listed below are said to have disclosed much confidential matter") that seems to me to suggest espionage.

Lord Jowitt's conclusion thus makes it seem that when Chambers in the libel suit, on November 17, made his revelation of espionage by Hiss, he was making a startlingly new charge that was absolutely without any connection with any of his previous statements about Communism. The facts seem to me to show that Chambers' position has been more consistent. He had throughout linked Communism with spying, but (until defending himself in the libel suit) had named no spies; in fact, in October 1948 in the Grand Jury hearing he denied that he could name one.

LORD JOWITT and Chambers differ only superficially as to the latter's motives in suppressing knowledge of Hiss's espionage until the examination in the libel suit, when Chambers produced copies and summaries of State Department documents in Hiss's handwriting or typed on Hiss's typewriters and stated that Hiss had given them to him. Lord Jowitt is certain that Chambers in not revealing what he knew about spying was thinking of himself and not of the others. Since Chambers, in order to suppress the truth successfully, had to suppress it both about himself and the others, it is impossible to decide whether he was primarily acting for the others, as he claims, and only by accident for himself, or whether he was primarily acting for himself and only by accident for the others. Altruism and selfishness here become indistinguishable, without any real difference between them, and which motive one picks as the decisive one depends on which motive one finds more plausible as an explanation of conduct. Lord Jowitt here probably has the more plausible theory, not because he is inherently right, but because, as Fenimore Cooper has pointed out, the lower the motive ascribed to a man's conduct the easier it is for us to understand it.

This theory of Lord Jowitt's (which incidentally must have as its underlying assumption Hiss's guilt) is more probable than the alternative that he advances: Chambers had been truthful in indicating that there

had been no espionage; "his later story was a complete fabrication to escape from the difficulties of the libel action." And in the British edition he insinuates, in favor of this theory, that Chambers, fearing exposure and ruin, attempted suicide just a day or two before he produced the documents at the pre-trial examination on November 17. An argument from consciousness of guilt is dubious at best, for one can never be reasonably sure what it is that a man feels guilty about. This particular argument has the additional weakness of being wrong in its facts. Chambers contemplated suicide in mid-November but decided against it, and did not make the suicide attempt until three weeks later.

In the American edition Lord Jowitt has corrected his error in date. The correction destroys his argument's principal support; but the argument is still made, and in a wording that is literally true but carries an erroneous suggestion: "Chambers describes in *Witness* how he contemplated suicide before he decided to produce the documents, and how, having produced them, but before testifying on their contents, he actually tried to encompass that crime." I do not know what Lord Jowitt means when he speaks of the attempt as being made "before testifying on their contents." I have read the entire transcript of the record of the second trial and have read fairly full accounts of the first trial, and it seems to me that Chambers never testified on the *contents* of these documents. Lord Jowitt's statement is true only in the sense that Chambers' suicide attempt was made before the occurrence of an event that has yet to take place.

To Chambers' consciousness of guilt Lord Jowitt contrasts Hiss's consciousness of innocence, to use the phrase of Claude Cross, the defense lawyer at the second trial. In the vigor and promptness of his denials of guilt, Alger Hiss has certainly acted according to our conventional image of innocence. And yet this may only show that Hiss had no reason to believe that Chambers had preserved any documents.

At the most, it might prove that he *felt* innocent. Lord Jowitt never shows the slightest sign of understanding that the Communist espionage about which Chambers testified was a crime undertaken not for money but out of high-mindedness, consistent not

only with a feeling of innocence but with an aggressive sense of virtue. It was a crime brought about by devotion to a cause. In view of this there is no force in Lord Jowitt's claim that Hiss wouldn't, as a matter of prudence, have delivered to Chambers papers typed on the Hiss typewriter or written by himself. The zeal for a better world does not generally stop at some mere point of prudence, and certainly not at the point of trusting a fellow zealot.

ALTHOUGH Lord Jowitt is fairly emphatic in drawing inferences adverse to Chambers on the issues of fact at the periphery of the case, he is by no means so definite on the issues of fact at its heart. He never explicitly demands absolute certainty, yet he seems to suggest that we should be in doubt as to Hiss's guilt so long as there is a theoretical possibility of his innocence. But Lord Jowitt never considers how extreme are the assumptions that we have to make if we are to believe that the jury was wrong and that Hiss was innocent.

For Hiss to be innocent we have to assume a deliberate plot against him by Chambers, beginning in July 1936 and maturing in 1948, and aided in its course by members of the FBI. We have to assume also that Chambers has had constant good luck in escaping detection, and Hiss constant bad luck, for on every vital issue the explanation consistent with innocence is downright improbable, or much less probable than the explanation consistent with guilt. I do not have space to illustrate all of these points and can set down only a few:

(1) Chambers testified that Hiss gave his old Ford to a Communist party member, using an unsuspecting auto dealer as an intermediate transferee. Hiss denied this and said he gave the old Ford to Chambers as part of a subleasing arrangement. Motor vehicle records show that Hiss in his own handwriting in July 1936 transferred his Ford, not to Chambers, but to an auto dealer, and that on the next day the dealer transferred it to a man who, when questioned in 1948, refused on the ground of possible self-incrimination to say whether he was a Communist. On this, Lord Jowitt says, "Now, of course, this transaction, if Hiss was responsible for it, would be enough to stamp him as an avowed Communist." On Hiss's behalf,

Lord Jowitt can only suggest that perhaps Chambers, to build up a case against Hiss, induced Hiss to make the transfer. If Lord Jowitt is right, Chambers has had the good luck of planning a bit of villainy in 1936 and having it come out a dozen years later exactly as he planned it, and Hiss has had the bad luck of forgetting that it was Chambers who induced him to transfer the car and to write in the name of the motor dealer.

(2) Chambers claimed that Hiss loaned him \$400 in 1937 to buy a car. The records show that Hiss withdrew \$400 from a savings account in cash on November 19 and that Chambers paid \$486 in cash for a car on November 23. The Hisses claimed that they used the \$400 on cash purchases for furnishing a new home; but it seems to be a fact that the new home was not leased until December and could not be occupied until the end of the year. As Lord Jowitt says, in the American edition, the "explanation which Hiss gave for this withdrawal was unconvincing." The loan story is important, for, if true, it shows the parties as in contact with each other more than a year after Hiss said their acquaintance had stopped, and it shows Chambers as having a much closer relation with him than Hiss ever admitted. For Hiss to be right, he would have had to have the bad luck of a foolish and unnecessary withdrawal of cash and also the bad luck of its coincidence in time with Chambers' purchase. More than that, Chambers had somehow to learn of the withdrawal. Lord Jowitt blandly suggests that the FBI told Chambers about it. There is not the slightest evidence of this.

(3) Mr. and Mrs. Chambers had an extraordinary knowledge of the details of the Hisses' life (details as varied as the color of their wallpaper and Mrs. Hiss's interest in taking courses at Mercy Hospital, Baltimore) in the years when, according to Hiss, the two families no longer saw each other. Lord Jowitt insinuates that for some of these details the FBI was Chambers' informant. But on some details Chambers testified at the House Committee hearings, and Mrs. Chambers at the pre-trial examination in the libel suit, which in both instances was before the FBI was ever known to be in the case.

(4) Hiss's only explanation of the four summaries in his own handwriting of cablegrams to the State Department is that he

wrote these summaries and used them in reporting orally to his superior on the contents of incoming cables. The summaries are remarkably formal for this purpose and sound as if prepared for the use of someone outside the Department. Thus a cable from London (and the information copies distributed by the State Department) identifies the sender only as Johnson, and a cable from Shanghai (and the information copies) identifies the sender only as Gauss; but Hiss's summary is more elaborate and states: "Johnson U.S. chargé at London cabled that. . . ." and "Gauss U.S. consul at Shanghai cabled that. . . ." Since Hiss knew who these men were, it would seem that his superior, who had been longer in the State Department, knew the same; only an outsider would have to be told who they were. This same way of identifying the sender is used also in the summaries that were typed on the Hiss typewriter, and no one has suggested an innocent origin for the typed documents. Moreover, some of the handwritten summaries appear in two versions, a very rough note and a more amplified one. The rough note would seem to be enough if it was to be used only in talking to his superior, but it was certainly too sketchy for an outsider's use. Hiss could explain the two drafts of each note only as the result of a failure of memory and having to go back to the cablegram in each case to amplify his first draft. This going back to the cablegram is crucial to his explanation, for if he could amplify his notes in some cases from memory alone, why write the amplification out? Why not merely deliver it orally to his superior? Yet in the one instance where the rough note has no indication of date, the amplified version does not give the precise date, but says "About March 2"—surely much more like an amplification from memory than from a second glance at the cablegram. Everything about the handwritten summaries fits only awkwardly into Hiss's explanation of them but is particularly consistent with Chambers'—that in the course of Hiss's spying activities, cables crossed his desk that he could not take home for copying, and these he summarized in his own handwriting.

(5) As I stated, no exculpating explanation has been advanced for the copies and summaries of State Department documents typed on the Hiss typewriter. If Hiss had

them typed, it can only be that he was giving them to Chambers. Hiss's defense with respect to the typing of these documents, which are dated chiefly over the first three months of 1938, was that the typewriter had been given away to the children of a servant in December 1937. But while the gift was established, the date was vague; in fact Perry Catlett's statement to the FBI before the trial indicated the gift in April 1938 or later, and the testimony of a man who lived in the Catlett house corroborated this. For Hiss to be innocent of connection with the typing of the documents, not only had the typewriter to be at the Catletts' in December 1937 but Whittaker Chambers, or someone acting for him, had had somehow—and no one can quite suggest how—to get into the Catlett home and, unobserved, type sixty-four pages, many of them single-spaced.

In order to support the Hiss defense we are asked at each turn in weighing ordinary events to accept the improbable and ignore the probable; the *cumulative* effect of so many improbabilities is downright absurdity.

I HAVE tried to be fair to Lord Jowitt's meaning, but often I cannot be sure what it is. He has a way of juxtaposing two facts which suggests to the reader an inference so extreme that one hesitates to believe that it was intended, yet the juxtaposition is meaningless unless that very inference is to be drawn. In the sheer diligence of his suggestiveness and of his insinuations—it would take a longer book than his to work out their logical implications and to answer them—Lord Jowitt reminds me of Senator McCarthy. The Senator and the Earl were both I believe trial lawyers, and they seem at times to have that gift of making everything seem suspicious which is the chief technique of an old school of advocacy.

Lord Jowitt as a human being has as much right to his doubts as any man. But, as a former Lord Chancellor and as an author, his position is somewhat different. To write so long an argument on the Hiss case and to come to no conclusion is of course itself a conclusion and a significant one. In net effect *The Strange Case of Alger Hiss* is not an exercise in reasoning but an appeal to authority, to the spectacle of the former highest judicial officer of Great Britain in a state of doubt.